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92-52

February 17, 1998

BY HAND DELIVERY

Ms. Magalie Salas, Secretary
Federal Communications Commission
1919 M Street N.W., Room 222
Washington, D.C. 20554

Re: In the Matter of Implementation of Section 309(j) of the Communications Act--Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses (MM Docket 97-234, GC Docket No. 92-52, GEN Docket No. 90-264. Reply Comments of Hispanic Information and Telecommunications Network, Inc.

Dear Ms. Salas:

Enclosed, on behalf of The Hispanic Information and Telecommunications Network (HITN), are the original and eleven (11) copies of HITN's Reply Comments in the above referenced rulemaking.

If you have any questions about this filing, please let me know.

Sincerely,

Ernest T. Sanchez

Ernest T. Sanchez
Counsel for the
Hispanic Information and
Telecommunications Network

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the	)	MM Docket No. 97-234
Communications Act -- Competitive Bidding	)	GC Docket No. 92-52
for Commercial Broadcast and Instructional	)	GEN Docket No. 90-264
Television Fixed Service Licenses;	)	
Reexamination of the Policy Statement on	)	
Comparative Broadcast Hearings; Proposals	)	
to Reform the Commission's Comparative	)	
Hearing Process to Expedite the Resolution	)	
of Cases	)	

To: The Commission

REPLY COMMENTS
OF
HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK, INC.

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Network, Inc.
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Dated: February 17, 1998

SUMMARY

The Hispanic Telecommunications and Information Network, Inc. ("HITN"), files Reply Comments to the Comments filed by a number of ITFS and Public broadcasting entities and associations. The Comments to which HITN replies took the position that ITFS stations were exempt from the competitive bidding requirements of the Balanced Budget Act of 1997's amendments to section 309 of the Communications Act. These Comments also advanced various policy-based arguments in arguing that the Commission, if it has discretion to make the determination, should not impose competitive bidding on mutually-exclusive ITFS applications but, rather, should continue to apply the existing rules and point system in such contests.

In its Reply Comments, HITN deconstructs and provides a critique of the statutory construction theories advanced by the five sets of commenters who dealt with the question of interpretation of section 309(j)(2). HITN explains that none of these parties have applied the accepted black letter rules of statutory construction and demonstrates the manner in which each of these parties has twisted or otherwise confused the statutory language and history. With respect to the so-called policy issues, HITN first points out that if the statute mandates competitive bidding for ITFS, the Commission lacks discretion as to whether it should use auctions.

HITN then considers the policy reasons advanced by the Anti-Auction Commenters and concludes that the reasons they advance are no longer valid in the world of education and distance learning at the end of the 20th Century. HITN has attached as Exhibits approximately 40 pages directly related to distance learning that were downloaded from the Internet. HITN argues that the "policy" reasons advanced by

the ITFS Commenters do not promote the public interest, convenience or necessity but, rather, are put forward for private market-protection reasons of the favored local ITFS licensees.

HITN concludes its Reply Comments by advocating a temporary "window" that would encourage settlements of pending ITFS application proceedings.

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To: The Commission

REPLY COMMENTS
OF
HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK, INC.

The Hispanic Information and Telecommunications Network, Inc. (hereafter, "HITN"), by and through its counsel, files these Reply Comments in the above-captioned rulemaking proceeding of the Federal Communications Commission. As with HITN's initial Comments, these Reply Comments are limited to the questions raised by the Commission in Section III. D of the Notice of Proposed Rulemaking ("NPRM"), entitled "Auction Authority for Instructional Television Fixed Service." HITN replies only to those comments which also addressed this section of the NPRM; these comments were filed by the following parties: the Association of America's Public Television Stations

(hereafter, "AAPTS"; ITFS considered in Part IV of its Comments); the Corporation for Public Broadcasting ("CPB")[1]; the National ITFS Association ("NIA"); a group of ITFS licensees that have designated themselves as "ITFS Parties"; the Indiana Higher Education Telecommunications System and the School District of Palm Beach County, Florida (both of which will be considered together inasmuch as both parties filed essentially identical comments and will be referred to hereafter as the "Crowell & Moring parties"); two sets of comments also considered together, one filed by a group of ITFS licensees, and the other filed by a group of public broadcast and ITFS licensee, two pages of which concern ITFS auctions (hereafter, the "Schwartz, Woods & Miller parties"); and, lastly, a group of North Carolina educational institutions and ITFS licensees who filed together with Wireless One of North Carolina, a wireless cable operator developing a statewide wireless cable network in North Carolina (hereafter, the "WONC, Inc. parties"). Collectively, these parties's comments will be referred to herein as the "Anti-Auction Comments."

In these Reply Comments, HITN demonstrates the various ways in which the Anti-Auction Parties have misconstrued section 309(j)(2). HITN then responds to the various "policy" arguments against competitive bidding. HITN's position is that the statute provides the 'Commission with no discretion but, rather, mandates competitive bidding for all mutually-exclusive applications for licenses and construction permits that are not expressly exempted in the statute. HITN also argues that, whatever the merits

[1] CPB adopted and incorporated by reference the Comments of AAPTS. These Reply Comments, therefore, respond to CPB's adoption of AAPTS and all reference to the AAPTS Comments refer also to CPB.

may have been of Rule 74.913 in 1985, those policies must be thoroughly reconsidered in light of the technological and educational realities of the 21st century.

I. The Anti-Auction Comments Misconstrue the Statutory Mandate of Section 309(j)

The NPRM asked for comment on three questions. The first of these was whether the Commission's tentative interpretation of Section 3002 of the Balanced Budget Act of 1997, codified as Section 309(j) of the Communications Act, was correct. That is, had Congress, by failing to exempt ITFS stations from competitive bidding, effectively mandated that the FCC must conduct auctions with respect to mutually-exclusive applications for such stations? The Commission indicated that it was inclined toward adopting this interpretation.

In its initial Comments, HITN agreed with that interpretation on the basis of accepted black-letter rules of statutory construction. The Anti-Auction parties, however, employing a variety of approaches to get around the plain language of the statute, have each misconstrued the statutory directive in one way or another. In this Reply, HITN shows the errors of these interpretations.

A. Misinterpretation of the Statute by Anti-Auction Commenting Parties.

The Anti-Auction Commenting Parties that deal with the statute have each misconstrued it in a different manner, but all have misconstrued it. These parties are AAPTS, NIA, the ITFS Parties, the Crowell & Moring Parties, and the Schwartz, Woods & Miller Parties.

1. Comments of AAPTS. In Section IV of its Comments, AAPTS attempts to use a variation of the same argument it advanced in Section I A with respect to

noncommercial educational broadcast station applications. Whatever the merits of this argument with respect to noncommercial educational broadcast stations, it has no applicability in the context of ITFS stations. AAPTS' interpretation of the statute in relation to ITFS in Section IV of its Comments, is specious, disregards the express language of the statutory exemption, and is contrary to the definitions of basic communications concepts set forth in Sections 153 and 397 of the Communications Act.

AAPTS argues that "the Balanced Budget Act precludes the use of auctions where ITFS applications are involved" by citing the definition of "noncommercial educational broadcast station" in Section 397(6). AAPTS claims that this definition is "written in terms of "'eligibility' to hold a noncommercial educational broadcast license" which, it further claims, is equally applicable to applicants for ITFS licenses. Thus, it argues, the exception provided in § 309(j)(2)(C), which exempts stations described in Section 397(6), should also be read to exempt ITFS applicants (AAPTS Comments, pp. 16 - 17). AAPTS has misread both statutes and its interpretation is erroneous.

Where AAPTS' argument fails is that it has utterly confused the far-different concepts of "station", "licensee", "applicant", and "entity". HITN has figured out where AAPTS went wrong. First, what § 309(j)(2)(C) exempts from competitive bidding are licenses "for **stations** described in section § 397(6) . . ." -- not, as AAPTS claimed, the licensees of, or applicants for, such stations. AAPTS has twisted the definition to imply the latter, but the statute is quite explicit and it does not say what AAPTS claims it does. In the statute, all three categories of exemptions under § 309(j)(2) are expressed in terms of the underlying service, not the pool of applicants. These are (A) public safety

radio services; (B) licenses for digital television service, and (C) stations described in section 397(6). These exemptions from the otherwise-generally-applicable auction requirement are not expressed in terms of the type of applicants that might apply for licenses for such stations or services but, rather, the service or station itself.

Second, section 397(6), to which we are referred by exemption (C), is the definition for the term "noncommercial educational broadcast **station**" not "noncommercial educational broadcast **licensee**." The definition concerns only the "eligibility of the **station to be licensed** (emphasis added)" to certain types of entities, not, as AAPTS claims, the eligibility of certain types of entities to apply for or hold licenses for such stations. AAPTS has it backwards. Section 397(6) defines a type of **station**, a "noncommercial educational broadcast station", as

> "a television or radio broadcast **station** which . . . is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association [or municipality] . . . (emphasis added)"

This language, like that of § 309(j)(2)(C) clearly refers to stations, not licensees or applicants. Moreover, it explicitly refers only to **broadcast** stations. Whatever the merit of AAPTS' statutory interpretation in Section I of its Comments with respect to participation in auctions for broadcast stations by noncommercial educational entities (regarding which HITN expresses no opinion), this argument has no applicability in the context of ITFS facilities, since these are not broadcast stations and the exemption is expressly limited, in its terms and its references, to such broadcast stations rather than to entities that might be applicants therefor.

The error in AAPTS' attempt to apply this argument to ITFS is further demonstrated by consulting Section 153 of the Communications Act, which defines most of the terms that AAPTS has confused. The term "station" is defined in § 153(35) in broad terms as something that is "equipped to engage in radio communication or radio transmission of energy." Subsection 153(5) defines "broadcast station" separately from the more general term "station" and does so in terms of the function of broadcasting. Broadcasting itself is defined in the next subsection as "the dissemination of radio communications intended to be received by the public", a definition which has long been held to exclude ITFS. Thus, the term "broadcast stations" is a subset, as is, *e.g.*, "land stations" [§ 153(22)], of the term "station." All broadcast stations are stations, not entities that own stations, but not all stations are broadcast stations.

A "licensee" is defined in subsection 153(24) as "the holder of a radio station license", while a "station license" or "license" is defined in § 153(42) as

> "that instrument of authorization required by this Act or the rules and regulations of the Commission made pursuant to this Act for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission."

Thus, AAPTS' claim that "any entity that is eligible to hold an ITFS license" is also "eligible to be licensed by the Commission as a noncommercial educational broadcast station" is patently erroneous because it mixes apples (entities/licensees/applicants) with oranges (stations); it is the latter that "are eligible to

be licensed" in the terms of § 397(6).[2] AAPTS is confused perhaps by this section's use of the passive voice in its definition of noncommercial education broadcast **stations**, for the statute refers to **stations** that are "eligible to be licensed" as a particular type of **station**, not to entities that are eligible to be granted licenses for such stations. Although the same types of noncommercial educational entities may apply for and hold licenses for both broadcast stations and ITFS stations, it is only when they apply for broadcast stations that are eligible for noncommercial educational broadcast stations status that the exemption set forth in § 309(j)(2)(C) for "stations described in section 397(6)" applies.

Another section of the Communications Act provides further insight into Congressional intent here. Section 397(7) of the Act, which directly follows the prior subsection's definition of "noncommercial educational broadcast station", defines the term "noncommercial telecommunications **entity**", not station. The types of entities defined and described in section 397(7) are similar to the "owners and operators" of "noncommercial educational broadcast stations" which are part of the definition of this latter term in subsection 397(6). Section 397(7) entities are defined as those that disseminate "audio or video noncommercial education and cultural programs to the public **by means other than a primary television or radio broadcast station** . . . (emphasis added)." In summary, subsection (6) defines broadcast stations operated by

[2] HITN also notes that AAPTS' twisted definition makes no sense if it is applied to licensees or applicants since the term that is defined is something which can be "owned and operated by a public agency or nonprofit private foundation, corporation, or association"; it is not something which is itself such an entity, as AAPTS argues.

noncommercial entities, while subsection (7) lists the types of entities that disseminate educational programming by means other than broadcast stations.

Obviously, if had Congress had wished to exempt the types of entities that may be applicants for ITFS licenses, it could easily have added subsection 397(7) to subsection 397(6) when it wrote the exemption paragraphs of Section 3002 of the Balanced Budget Act. But Congress did not do so. Rather, it wrote the exemption solely in terms of type of **station**, not type of **licensee**, that is exempted, and it cited only subsection 397(6), not 397(7). Basic rules of statutory construction make it abundantly clear that the exemption is limited to broadcast stations, and was not intended to include either ITFS stations or applicants for ITFS stations.

2. Comments of the National ITFS Association ("NIA"). NIA begins its statutory construction argument with respect to section 309(j)(2)(C) by acknowledging that

> because of the way the Act is structured, providing limited exceptions to the general rule requiring application if the competitive bidding process, and because the exception from the use of competitive bidding in Section 3002(a)(2) of that Act only mentions stations listed in Section 397(6) of the Communications Act of 1934, and further because ITFS licenses do not fall within the technical definition of Section 397(6), it is altogether too easy to infer a Congressional intent where, we argue, none was expressed or intended. (NIA Comments, p. 1).

NIA goes on to claim that the legislative history of the Balanced Budget Act "strongly suggests the contrary (NIA Comments, p. 2)." This claim is unsupported, as it must be since the legislative history suggests no such thing. The claim is also contrary to the rules of statutory construction.

The primary basis for NIA's argument is its claim that Congress intended "to make competitive bidding mandatory only for commercial licenses (NIA Comments, p.

3)." NIA attempts to support this claim by arguing that section 3002(a)(2) of the Balanced Budget Act "intends the use of auctions to apply on a commercial/ noncommercial basis rather than a broadcast/nonbroadcast basis (*Id*)." No textual or legislative history support is offered to bolster this argument, an argument that conveniently ignores section 309(j)(2)(B). Subsection (B) is the one that specifically exempts "initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses." Congress provided this exemption to services which are most certainly commercial, and which are also broadcast stations. Thus, NIA's claim of an alleged common link among the exemptions -- they must all, NIA claims, be licensees which are either a government or not-for-profit entity engaged in noncommercial services -- grows a bit attenuated, one might say, when one attempts to apply it to exemption (B).[3]

Although NIA claims in several places that the legislative history of the Balanced Budget Act supports this interpretation, the only actual citation of that history to which it points concerns public safety radio services, exemption (A). Nothing in the quoted language or the text from which it was derived indicates a Congressional intent to limit the other exemptions to noncommercial entities for any and all types of communications services. The plain language of exemption (B) quickly dispels any such fanciful notion.

NIA's other arguments (NIA Comments, p. 4 - 6) are, similarly, without textual, logical, or other support. NIA's argument that the overall Congressional intent to use

[3] While some have criticized this Congressional exemption as a "giveaway" to existing television broadcast licensees, that hardly makes it the exempted digital television service a noncommercial one, since the vast majority of these new digital stations will go to commercial broadcast licensees.

auctions to increase efficiency of Commission procedures militates against auctioning ITFS stations is simply a fiction. In the first place, no objective support is provided for NIA's blithe presumption that the present ITFS comparative process is so perfect, so efficient that Congress would not wish to tamper with it. Just because NIA, whose members are the chief beneficiaries of the present point system of Rule 74.913, believes that "the system works" does not mean that Congress would agree, or that this belief is objectively accurate. NIA is also in error when it attempts to limit the need for the efficiencies provided by auctions to "innovative services" alone. Commercial analog radio and television broadcast stations, which clearly are subject to competitive bidding in the future, are hardly an innovative technology and have been around since well before the 1963 authorization of ITFS.

With respect to NIA's argument (Comments, p. 5 - 6) that Congress could not have wished to impose auctions on educators, HITN points out that it is unlikely that the Congress which passed the Balanced Budget Act of 1997 -- a Congress that is also in favor of educational vouchers for public school parents -- believes that education and competition are incompatible concepts. Quite the contrary should be assumed.

NIA suggests (Comments, p. 4) that "it seems reasonable, logical, and even likely" that Congress did not "think of the ITFS service in creating this exception . . . because this service is virtually unknown outside the educational community." NIA further speculates that "the drafters may well have thought that they were encompassing the entire range of educational uses of frequencies into the exception by citing the statutory provision" [presumably, the "statutory provision" referred to is section 397(6)]. Are we

then to assume also that the drafters failed to notice the very next subsection of that section? As pointed out above, section 397(7) most certainly does deal with other distributors of educational programming by means other than broadcast. NIA offers no justification for making this rather large assumption that the drafters of the Balanced Budget Act not only did not know what they were doing in the new law, but were also unaware of the terms of the statute they were amending. NIA's version of statutory construction, premised upon legislative ignorance, mistake, and overlooking key terms, does not comport with any rules of construction found in the hornbooks or leading cases. It would also come as a surprise to the members of the Congressional committees that have jurisdiction over telecommunications. Just how much ignorance of ITFS and distance learning should NIA attribute to Congress? Must we assume that the state universities and colleges which currently hold ITFS licenses and belong to NIA have never mentioned their distance learning services, including ITFS, to any members of their state Congressional delegation? These arguments, like those already considered, are simply not credible.

The balance of NIA's arguments are policy-based rather than issues of statutory construction. As such, they will be considered in Part II of these Reply Comments.

3. Comments of the ITFS Parties. These ITFS licensees argue (Comments, p. 2 - 4) that section 309(j) was only intended to apply to broadcast stations. For this reason, they claim, Congress did not even think of ITFS when the time came to write exemptions to that statute. In support of this remarkable interpretation, all they quote a is a single sentence from the House Conference Report which, by its own terms, does

not imply a restriction to broadcast frequencies or licensees. Several things are wrong with this argument. First, it ignores the plain language of the statute, which applies to "mutually exclusive applications . . . for any license or construction permit (emphasis added)." It is a basic rule of statutory construction that it is not necessary or appropriate to consult legislative history if the plain language of the statute is clear. As the Supreme Court has explained: "[I]n interpreting a statute a court should always turn to one cardinal canon before all others . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what is says there. *Connecticut National Bank v. Germain,* 112 S. Ct. 1146, 1149 (1992). Another rule of construction also runs contrary to the ITFS Parties' claim: "When Congress enumerates an exception or exceptions to a rule, we can infer that no other exceptions apply. *Koniag v. Koncor Forest Resource,* 3 Fed 3d 991, 998 (9th Cir. 1994; *Horner v. Adnrzjewski,* 811 F.2d 571 (Fed. Cir.), cert denied, 484 U.S. 912 (1987). This is black-letter hornbook law. See 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 47.23 (5th Ed. 1992). These elementary rules of construction also undermine the AAPTS and NIA arguments.

The Anti-Auction parties cannot accept the plain language of the statute, so they strain the legislative history to try to wring some support their position. But not only is it unwarranted and inappropriate to consult legislative history when the basic rules of construction dictate following the plain statutory language point, but these parties can point to no language in the legislative history that indicate that ITFS was meant to be excluded. All they offer is vague inference and extrapolation. We must recognize that, after more than 200 years, Congress knows how to write an exemption if it wants to

grant one. The ITFS Parties do not directly dispute Congress' expertise as legislative draftsmen; rather, they merely suggest that "it is possible" that Congress simply overlooked ITFS or meant to limit auctions to broadcast services. No support is offered for either supposition. They also advance, but fail to support, the remarkable proposal that the FCC, without regard to what Congress might have intended, should simply "exercise its authority" to classify ITFS as exempt from competitive bidding. The Commission only has that authority if Congress has delegated it to the agency. HITN doubts that the ITFS parties really intend the Commission to take such an activist stance. If Congress has not exempted ITFS, then it subject to the competitive bidding requirement. The Commission could have no the authority to exempt ITFS from the auction process in the face of a legislative mandate to the contrary and the ITFS have not offered a reasonable basis for any other interpretation.

4. Comments of the Crowell & Moring Parties. IHETS and Palm Beach, the Crowell & Moring Parties, make the similar argument that, even though Congress has not provided an exemption for ITFS, the Commission should nevertheless imply such an exemption because, they argue, competitive bidding for ITFS would lead to an "absurd or illogical result." (Crowell & Moring Parties, Comments, p. 5). This argument is highly conclusory and lacks objective support. Competitive bidding for ITFS frequencies is inherently neither absurd nor illogical. The concept of auctions may make the Crowell & Moring parties unhappy to lose their lock on ITFS, and it may reflect different public policy considerations than the ones favored by these parties, but it is neither absurd nor illogical nor unjust nor capricious for Congress to subject ITFS applications to

competitive bidding. To apply the statute as it is written would not even overturn any sound rule of public policy; rather, it would simply reflect the evolution of ITFS regulation and distance learning over the past several years. During the time since 1985, the Commission and the ITFS industry have grown increasingly to accept commercial use of ITFS frequencies and mutually-beneficial relationships between ITFS licensees and the commercial MDS lessees of excess ITFS capacity. During this same period, as HITN explains in Part II below, the nature of distance learning has evolved substantially due to technological advances not imagined when Rule 74.913 was promulgated.

Contrary to the warnings of the Crowell & Moring Parties, competitive bidding would not automatically result in the erosion of "the essential educational character of ITFS." Their arguments, in fact, are simply policy arguments in the guise of statutory construction, but they do not reflect the public interest so much as the entrenched interests of ITFS educational institutions. That is, the Crowell & Moring Parties have decided that, for them, it would be "absurd" and contrary to their vision of public policy if they now must participate in auctions if they want any more ITFS stations. Attempting to universalize this position, they claim that Congress could not have intended such a result. Therefore, they contend, the statute must be interpreted to mean something that is, in fact, the diametric opposite of what it says. Such an interpretation is contrary to the basic canon of construction enunciated by the Supreme Court in the *Connecticut National Bank v. Germain* case, supra., and lacks any support other than these parties' wishes and beliefs.

The Crowell & Moring parties next suggest that the FCC should "consider whether Congress' reference to Section 397(6) entities was intended to exclude ITFS stations or whether Congress intended to create an exemption to include all non-commercial educational stations." (Comments, p. 6 - 7). The answer to this question can only be the former, for Congress did not exempt section 397(6) **entities**, as they suggest; rather, Congress exempted section 397(6) broadcast stations, as HITN explained above in reply to the similar error of AAPTS. HITN again points to the actual statutory language in both section 309(j)(2)(C) and section 397(6) -- the exemption is directed to the station, which is narrowly defined as a broadcast station, rather than to the nature of the licensee. This is the case with all three exemptions -- the service is exempted, not the applicant. If Congress had wished to create an exemption that would include ITFS entities, it could have either used language to describe specifically what was being exempted, as it did in subsections (A) and (B), or it could have added subsection 397(7) to its statutory reference to section 397(6) in subsection 309(j)(2)(C). Congress, however, did neither and, as the black letter law authorities explain to us, Congress should be presumed to know what it doing when it writes an exemption. This section of the Balanced Budget Act does not lack clarity, as these parties claim. They simply do not like the result.[4] The remainder of these parties' arguments are explicitly, rather than implicitly, policy-based, and thus will be considered in Section II.

[4] Their suggestion that the Commission go to Congress for what is an unnecessary "clarification" is more properly directed at themselves. If they dislike the statute as it presently stands, they are free to go to Congress for an express exemption of ITFS and make their policy arguments there.

5. The Schwartz, Woods & Miller Parties. These parties' entire statutory construction argument is premised upon the claim that, because the inclusion of ITFS applications in auctions "is nowhere mandated by" the statute, this means that "the Commission does not have any specific authority to mandate auctions for ITFS entities." This is both a superficial and highly conclusory interpretation of the statutory provisions. A specific "mandate" of ITFS auctions is not necessary. As explained above, "when Congress enumerates an exception or exceptions to a rule, . . . no other exceptions apply." *Koniag v. Koncor Forest Resource, id.* Because ITFS is expressly **not exempted** is the reason why it is subject to the general rule. That is the way statutory construction rules work. If a legislature says "any entity, except A, B, and C, is subject to this law", then every entity that is not A, B, or C is subject to it. The Schwartz, Woods & Miller Parties, like the other Anti-Auction Commenters, have also failed to raise any convincing argument that would overcome the plain language of the statute.

B. How the Statute Should Be Interpreted.

NIA argued that "it is altogether too easy to infer a Congressional intent where, we argue, none was expressed or intended." As demonstrated in section I. A. 2 above, NIA failed to make its case for exemption. HITN wishes to point out, however, that the lack of any statutory basis for an ITFS exemption is not simply a matter of inference. If this process seems "easy" to NIA, the reason is because the rules of statutory construction direct a fairly straightforward process: go first to the language and structure of the statute itself before rummaging in legislative history. And, when we do go to the statute itself, we very often find that a particular piece of legislation, such as

the Balanced Budget Act of 1997, has no overall grand design -- such as commercial versus noncommercial or broadcast versus non-broadcast, as the Anti-Auction parties speculate. The process need not be so complex as they would require. Sometimes, one section of a statute may simply reflect the differing and unrelated means that members of Congress might envision for effectuating a particular result; sometimes, a collection of exemptions in a single section may simply be the product of "hard-fought legislative compromise." *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986). The Anti-Auction Commenters sought, but failed, to find a common link among the three enumerated exemptions to the auction process. They did this because they hoped to point to some alleged overall goal that Congress was supposedly trying to effectuate in creating these exemptions -- some goal that, they claimed, supported an interpretation of the legislation that would also permit an implied exemption for ITFS.

None of the proposed interpretations accomplished the goal of harmonizing the three express exemptions. This is because the three essentially have nothing in common but successful advocacy of their position. What is far more likely than the tortured attempts to harmonize the exemptions is that these three interest groups, noncommercial educational broadcast stations, commercial broadcast licensees looking toward future digital TV licenses, and public safety radio services, were able to prevail with a sufficient number of Congresspersons to be included within section 309(j)(2). For one reason or another, a sufficient number of members of Congress were willing to vote for exemption for each of these services and their convenient inclusion within one subsection of the

statute may mean nothing more than this. The legislative history is silent on ITFS, and gives no indication that any strained and tortured explanation proffered by the Anti-Auction parties is more likely than the simple one suggested here.

Fortunately, it is not necessary to consult the legislative history because the Commission's tentative interpretation of the plain language of the statute is logical and correct: a general directive for competitive bidding has been mandated by Congress to the FCC and only three express exemptions to that mandate were provided. ITFS was not one of them. Therefore, ITFS is not an exempted service. What is known about the legislative intent is that Congress clearly wanted to extend the Commission's use of auctions to include as many types of licenses as possible. This is manifested in section 309(j) which uses the term "any" license or construction permit. The three exemptions to this general rule are narrowly drawn to apply to only certain specific types of services, rather than types of licensees or applicants or any broader categories. Therefore, logic and basic black-letter hornbook principles of statutory construction dictate the conclusion that the Commission must adopt competitive bidding for ITFS applications and lacks discretion on this matter.

II. Public Policy Arguments Advanced by the Anti-Auction Commenting Parties Do Not Overcome the Congressional Mandate and Are Not, In Any Event, Compelling in the Present-Day World of Distance Learning

Given the Congressional mandate of section 309(j) and the lack of any exemption for ITFS services in subsection 309(j)(2), the various policy-based arguments raised by the Anti-Auction Parties are essentially irrelevant. The Commission lacks any discretion in the matter of whether mutually-exclusive applications for ITFS services must be

auctioned -- they must be. As a result, the arguments advanced by the Anti-Auction parties as to whether the Commission **should** adopt competitive bidding for ITFS -- ranging from "we can't afford competitive bidding" to "society will suffer" -- must be disregarded. Given the clear statutory mandate in favor of auctions, the "policy" arguments cannot have any effect on whether or not auctions should be used for ITFS.

It is worthwhile, however, to subject premises and assumptions that underlie the "policies" advanced by the Anti-Auction parties to closer scrutiny. Would the public interest, convenience, and necessity really be served by exempting ITFS for the reasons these parties claim? The majority of ITFS licensees and applicants, including the Anti-Auction Commenting Parties, certainly consider the present rules, the present process, the point system under Rule 74.913, to constitute the best of all possible worlds. After all, these parties are local, they are traditionally accredited and, under these they will generally win.

But, it is time to ask, does this mean that the highest and best public policies -- for education, for diversity, for development of the telecommunications infrastructure -- are also served when the present system uses these points to award ITFS licenses? The assumptions that underlie the arguments of the Anti-Auction Parties may no longer be as valid as they were in 1985. Regardless of the beliefs of the academic purveyors of education who make up the majority of the anti-auction ITFS commenters, the policies enshrined in 1985 rules are not sacrosanct and must give way to new theories of educational efficacy and today's technological realities.

In 1998 and on into the 21st Century, in the face of the Internet and global distance learning, one simply cannot agree with the ITFS Parties that "the nature of education itself . . . is first and foremost a local endeavor." (ITFS Parties, Comments, p. 7). And if localism no longer has the same primacy it once held, in an age when the Vice-President encourages grade school children to "surf the Web" and an elementary school teacher reaches students around the globe simultaneously from the space shuttle, then perhaps it is no longer appropriate that the Commission's policies "favor those ITFS applicants that are local (*Id*)" and accredited by some regional accreditation agency made up of entities just like itself. HITN responds in the next section of these Reply Comments to the so-called policy arguments put forward by the Anti-Auction parties.

HITN also draws the Commission's attention to the various items it has attached as exhibits to these comments. These exhibits consist primarily of information that has been downloaded from Websites on the Internet that concern distance learning -- including Websites maintained by or linked to a number of the Anti-Auction commenters, such as PBS, the University of Indiana, the University of Wisconsin, and the Ana G. Mendez Educational Foundation. These sites reveal an approach to and understanding of distance learning which is not local but regional, national, global. Education is no longer limited to a single campus or school district or county, but spans geography, demographics, and technology. The policy considerations advanced by the Anti-Auction Parties are tired, outworn, no longer relevant to these concepts of education and distance learning and many of these Parties are themselves in the forefront with own exciting and technologically innovative educational enterprises. The